there is no carrier service capable of meeting such need."

In dismissing an action by the railroads brought to annul and set aside that order of the Commission, the District Court for the Eastern District of Virginia on January 9, 1952 (*Alabama Great Southern R. Co., et al.* v. *United States,* 103 F. Supp. 223; Annex D to aff., R. pp. 186-192) approved findings of the Commission underlying its grant of authority that the immediate and urgent need found by the Commission "was demonstrated by the port history, the port economy, and the port demands of the Savannah area"; that industries had chosen the Savannah area for their plants "because of the available coastal ship service", which had all been suspended in 1942 and none restored when the Commission's order was made. "Their anticipated expansion was predicated on this service. Commercial ties with manufacturers in the northeast United States, and competition with other ports along the Atlantic Ocean front, were not maintainable by shippers in the Southeast without water transportation at hand at Savannah" (103 F. Supp. at p. 225; Annex D to aff., R. p. 188).

The Virginia District Court also pointed to the fact that the Federal Maritime Board had urged the Commission to authorize the service on the ground that "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine", and called attention to the 1,861,900 tons of commodities water-borne between Savannah and New York, in the period 1939-42 (103 F. Supp. at p. 226; Annex D to aff., R. p. 189).

Yet due to the conflict of decisions between the Commission and the District Court, each finding that it has no jurisdiction to give petitioner adequate (or any) relief as to car interchange, the parties to the conspiracy continue, and until such conflict has been resolved by this Court,[3] will continue, to frustrate this public interest.

Petitioner commenced service between New York and Savannah on November 30, 1951, immediately following the Commission's grant of temporary authority to furnish the public with a service which it found was urgently and immediately needed. For the past year, Seatrain has sought from the Federal Court "the privilege of carrying the very railroad cars which carry freight to its ports" (See *United States* v. *Pennsylvania R. Co., supra,* at p. 617), not owned by railroads which participate in and maintain through routes with Seatrain. Seatrain has been unable to render to the public the superior service of which it is capable because of the lack of this right. The service has been materially restricted and hampered by reason of Seatrain's inability to obtain that right. Relief from such restrictions is needed as urgently and immediately as the service itself is needed so that Seatrain can give the public the inherent advantages which cannot be given until it obtains the right to carry all cars.

The second question presented is so interrelated with the first that it, too, requires prompt determination. Accord-

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[3] Inasmuch as the conflict of decisions presented by this case arose out of the District Court's interpretation of an opinion of this Court upholding an order of the Commission which reflected contrary findings, it would hardly appear helpful to this Court to have a further interpretation by the Court of Appeals.

ingly, petitioner respectfully prays that this Court grant certiorari to review both of the questions presented, but not either one of them without the other.

Respectfully submitted,

CARL E. NEWTON,

THEODORE S. HOPE, JR.,

*Attorneys for Petitioner,*
*Seatrain Lines, Inc.*

*Of Counsel*:

DONOVAN, LEISURE, NEWTON,
LUMBARD & IRVINE,

Dated: December 10, 1952.

## APPENDIX A

### Statutes Involved

Sherman Antitrust Act, sec. 7.

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Clayton Act, sec. 16.

> "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions

of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Interstate Commerce Act, sec. 8.

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, sec. 16(1).

"That if, after hearing on a complaint made as provided in section 13 of this part, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Interstate Commerce Act, sec. 1(4).

"It shall be the duty of every common carrier subject to this part to provide and furnish trans-

portation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Interstate Commerce Act, sec. 1(10).

"The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

Interstate Commerce Act, sec. 1(13).

"The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commis-

sion may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto."

Interstate Commerce Act, sec. 1(14)(a).

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

Interstate Commerce Act, sec. 3(4).

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

*Appendix A*

Interstate Commerce Act, sec. 7.

"[*As amended August 9, 1935*] [49 U. S. C., §7.] That it shall be unlawful for any common carrier subject to the provisions of this part to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this part."

Interstate Commerce Act, sec. 15(3).

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, how-

ever, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Interstate Commerce Act, sec. 305(b).

"It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers."

*Appendix A*

National Transportation Policy.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Office - Supreme Court, U.S.
FILED
FEB 6 1953
HAROLD B. WILLEY, Clerk

No. 497

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

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SEATRAIN LINES, INC., *Petitioner,*

v.

PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, and ASSOCIATION OF AMERICAN RAILROADS, *Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF IN OPPOSITION FOR THE RESPONDENTS PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, AND ASSOCIATION OF AMERICAN RAILROADS

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### OPINION BELOW

The opinion of the United States District Court for the District of New Jersey (R. 593-622, 624-625) is reported at 108 F. Supp. 113. Petitioner's appeal was docketed in the United States Court of Appeals for the Third Cir-

cuit on November 25, 1952, and has not been heard or decided by that court.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTION PRESENTED

Whether the United States District Court for the District of New Jersey erred in holding that petitioner's suit for private relief under the Sherman and Clayton Acts should be dismissed because the Interstate Commerce Commission has primary jurisdiction of the subject matter of the alleged cause of action.

## STATUTES INVOLVED

The relevant provisions of the antitrust laws and of the Interstate Commerce Act are set forth in Appendix A to the petition.

## STATEMENT

In December, 1951, petitioner brought suit in the United States District Court for the District of New Jersey seeking treble damages under the antitrust laws against four of the respondents here[1] and injunctive relief against them, as well as against the other respondents, four other railroads, and six other railroad associations and committees. The respondents, other than the Louisville & Nashville Railroad Company, on April 2, 1952, filed motions to dismiss the amended complaint on the grounds that the matters complained of fell within the exclusive or primary jurisdiction of the Interstate Commerce Commission, that the suit was barred by Section 16 of the Clayton Act, and that the complaint failed to state a claim upon which relief could

[1] These are the Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Southern Railway Company and the Louisville & Nashville Railroad Company.

be granted (R. 441-442). Respondent Louisville & Nashville Railroad Company moved to dismiss the complaint on the grounds of invalidity of service and that the venue was improperly laid. Other defendants below either answered or moved to dismiss upon various grounds.[2]

Petitioner moved for a preliminary injunction to restrain the allegedly illegal exclusion of the petitioner from the benefits of certain arrangements among the railroads concerning the use and interchange of freight cars that are provided by what are known generally as the Car Service and Per Diem Rules (R. 57-60). Petitioner's and respondents' motions were argued on April 14, 1952.[3]

The district court, in reliance on *Far East Conference* v. *United States*, 342 U.S. 570, 576-577, and other decisions of this Court, held that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission or were subsidiary matters incidental to the principal allegations of the complaint and therefore insufficient to confer jurisdiction upon the court (R. 615, 618, 621-622). The district court accordingly denied petitioner's motion for a preliminary injunction and dismissed the complaint (R. 623, 625-626).

Notice of appeal was filed on November 21, 1952 and the appeal was docketed in the Court of Appeals for the Third Circuit on November 25, 1952.

A discussion of the issues raised by respondents' motions to dismiss the amended complaint requires brief comment on the origin and nature of the controversy between Seatrain and the railroads.

Seatrain began coastwise operations on October 6, 1932. It offered a novel type of transportation service: water carriage of loaded freight cars, swung by a crane from railroad

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[2] Voluntary dismissals have been entered with respect to ten defendants below who are not made respondents here (R. 45, 633).

[3] Hearing on the motion of the Louisville & Nashville Railroad was deferred (R. 602).

tracks onto the tracks in the Seatrain vessel, and similarly unloaded at destination. There have been difficult problems in adjusting the relationships between this rail carrier by water and the railroads. In the past twenty years there have been eighteen Commission proceedings involving these relationships, of which six are still pending. The Commission's reports contain fifteen opinions dealing with these proceedings. Four of the Commission's orders have been reviewed in the courts, three reaching this Court. The separate proceedings are tabulated in note 3 of the opinion below (R. 608-609).

The basic question running through all these proceedings is whether the Commission should deal with Seatrain as though it were a break-bulk water carrier or as though it were a rail carrier.[4] It is in fact neither, but instead a rail carrier by water. One of the important issues involved in these proceedings was whether Seatrain, which owns no freight cars, should be permitted unrestricted use of the freight cars of the railroads in the conduct of its business and, if so, upon what terms and conditions.[5] From the previous litigation there has not emerged a definitive solution of the controversy. Each side has within the past year taken steps to seek that definitive solution.

Seatrain, by its complaint below, sought to remove the whole controversy—a complex series of technical issues in

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[4] In *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co.*, 226 I.C.C. 7, 12 (1938), the Commission said, by way of definition of a break-bulk water carrier: "So designated because rail-and-water shipments moving in connection therewith break bulk by being transferred between railroad cars and the vessels at the ports."

[5] Specifically, the railroads have opposed giving Seatrain a status which would permit it (a) to compete for rail traffic with the commanding inducement of much lower rates for like service, based upon the Commission's equating Seatrain's position to that of a break-bulk carrier rather than the all-rail service; (b) to avoid per diem rental on freight cars waiting loading aboard Seatrain vessels by analogy to break-bulk carriers, in contrast to the normal obligations of the railroads themselves; (c) to obtain the unrestricted use of railroad-owned freight cars without obligation to bear the real risks and costs of ownership ordinarily borne by railroads or to meet the normal railroad burden of moving empty cars.

transportation economics and commerce law—from the Interstate Commerce Commission to the district court and to have it dealt with under the antitrust laws rather than the Interstate Commerce Act. As to matters in which it had previously obtained relief from the Commission, petitioner asked the district court to expand and to amend that relief and to add the sanctions of contempt. As to matters in which the Commission had denied relief, petitioner asked the court by injunction to give the very relief the Commission had refused. It asked, in cases where the Commission clearly has reparation jurisdiction, and even in cases where the Commission had exercised that jurisdiction by denying Seatrain's claims for reparation, that the court award it treble damages under the antitrust laws. It asked that the court decide issues under the Interstate Commerce Act which have never been submitted to the Commission, but which lie within its jurisdiction.

Following the filing by respondents of their motions to dismiss, petitioner withdrew all of its prayers for relief except those directed against (1) the alleged concerted exclusion of Seatrain from the benefit of the railroads' joint arrangements for the use and interchange of freight cars and (2) the alleged concerted use by respondents of certain unfair competitive practices, specifically the alleged abuse of administrative and court procedures for the purpose of injuring petitioner's business.

The respondent railroads believed that the controversy between Seatrain and the railroads should receive a definitive and speedy determination by the agency vested with statutory authority to determine the basic issues involved. They, accordingly, filed, on March 26, 1952, a complaint with the Interstate Commerce Commission asking for a comprehensive examination and decision of the many issues between Seatrain and the railroads. After repeated extensions of time to plead, granted at petitioner's request, petitioner, on December 10, 1952, filed an answer to this complaint. The basic question which the petitioner now asks

this Court to consider is, therefore, together with others, now at issue before the Interstate Commerce Commission.

Finally, petitioner itself on December 10, 1952, filed with the Interstate Commerce Commission an elaborate petition for a declaratory ruling as to its jurisdiction over this controversy (App. B to Petition).

**ARGUMENT**

The question sought to be raised by the petition does not require or deserve review by this Court; the decision of the district court is clearly correct. See *Far East Conference* v. *United States*, 342 U. S. 570, and *S. S. W.* v. *Air Transport Association of America, et al.*, 191 F. 2d 658 (App. D. C. 1951), cert. denied 343 U. S. 955. In any event, the petition fails to make any showing that justifies review by this Court at this time. This is essentially a private controversy; it raises no issue of great constitutional significance or of extraordinary national importance that requires immediate consideration by this Court. It is not to be classed with those cases where, because of urgent public need for prompt settlement of the issues involved, this Court has been willing to forego the benefits of careful review by the Court of Appeals. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 584; *United States* v. *United Mine Workers*, 330 U. S. 258, 283, 289; *Ex parte Quirin*, 317 U. S. 1, 19-20; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 333-334; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 243, 295.[6] "The power which Congress has given to this Court to short-circuit the Courts of Appeals should not be

[6] There is no contention that issues, similar to those here, are presented in cases already pending before this Court, a circumstance that has, upon occasion, led to the employment of this extraordinary procedure. *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 299; *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 324-325; *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-412, 415, n. 2; *Porter* v. *Dicken*, 328 U. S. 252, 254; cf. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 370-371.

exercised except for some compelling reason of wise judicial administration," Frankfurter, J., concurring in part and dissenting in part in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 384.

1. Petitioner attempts to support its effort to by-pass the Court of Appeals on the ground that its service from New York to Savannah, which has recently been instituted, has been "materially restricted and hampered" by reason of respondents' activities.[7] The facts do not support this contention. The same contention was made in the district court in support of the petitioner's motion for preliminary injunction, but there was a failure of proof.[8] This contention was not sustained by the district court. In any event, the need for interlocutory relief, even if it had been shown to exist, would not be a basis for immediate review by this Court. That would be a matter for the district court and the court of appeals.

2. Petitioner asserts that there is a conflict between the district court and the Commission over the question of the Commission's authority to order car interchange. Petitioner contends that the Commission has held that it can order car interchange only by those railroads which do or may participate in through routes with petitioner, and that

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[7] Petitioner points out that the Interstate Commerce Commission in authorizing this service on a temporary basis found that there was an "immediate and urgent" public need for the service. What may be "immediate and urgent" for the purposes of a temporary authorization by the Interstate Commerce Commission to operate the transportation service is unrelated to the exercise by this Court of its power of extraordinary review. The New York-Savannah service is in operation under temporary authority from the Commission, and the continuation of that service is in no way dependent upon the final disposition of this suit.

[8] The respondents presented proof, which was undisputed, that railroads owning approximately 50% of the boxcars owned by Class I railroads had consented to the use of their cars in petitioner's New York-Savannah service, and that the five non-consenting railroads against whom the preliminary injunction was sought owned only 18% of the total number of boxcars owned by all Class I railroads (R. 460).

the district court, on the other hand, held that the Commission had plenary authority to order car interchange. Admittedly, the Commission, prior to the decision of this Court in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, expressed the view that it could order car interchange only where through routes existed or as an incident to its power to prescribe through routes. Petitioner, however, points to nothing indicating that since that decision of this Court the Commission retains this restricted view of its authority. It should not be assumed that the Commission will ignore the broad holding of this Court's decision or that it will decline to exercise the jurisdiction necessary to decide the complex controversy between Seatrain and the railroads.

Furthermore, the issue sought to be raised by the petitioner is not, in fact, raised by petitioner's suit under the Sherman Act. All of the railroads named as defendants in that proceeding and against which relief is sought are railroads that are admittedly in a position to be parties to through routes with Seatrain. Even on a restricted view of the Commission's authority, the relief which Seatrain seeks against respondent railroads in the antitrust proceeding is the same relief which the Commission has the power to grant.

However this may be, the asserted conflict between the Interstate Commerce Commission and the district court does not justify immediate review by this Court. If Judge Forman's careful opinion be mistaken, the court of appeals can correct his error. Nor, indeed, is any reason given why petitioner should rush to this Court prior to the Commission's own re-examination of the issue; that re-examination is involved in respondent railroads' complaint filed with the Commission in March, 1952, and is sought to be raised, also, by petitioner's own petition to the Commission in December, 1952, for a declaratory ruling.

3. The second ground of the petition is that the district court held that the Commission had authority to award

reparation for unfair competitive practices in abuse of administrative and court proceedings. But respondents did not urge and the district court did not hold that the Commission had any such authority.[9] We urged, and the court held (R. 618) that these were incidental or subsidiary complaints, insufficient in themselves to warrant a retention of jurisdiction.[10] This holding is correct.

In *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480-485, the complaint similarly included a number of subsidiary allegations as to unfair competitive practices, strikingly like those alleged by Seatrain. The Court held them so interrelated with the main charges of violation of the Shipping Act "as to be in effect a component part of them," and accordingly dismissed the complaint. See also *Terminal Warehouse* v. *Penn. R. R.*, 297 U. S. 500, 513. Thus, so long as the Interstate Commerce Commission has jurisdiction over ". . . the dominant facts alleged in the present case as constituting a violation of the Antitrust Act" (*Cunard* case, 284 U. S. at 483), its jurisdiction cannot be defeated by appending to the complaint corollary and minor allegations of misconduct over which the Commission has no jurisdiction.

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[9] We did suggest that by a principle cognate to that of primary jurisdiction, the district court might well seek the advice of the Interstate Commerce Commission on the question whether its processes had been abused, or whether the litigation before it was unnecessarily delayed or vexatiously carried out. This is far from a contention that the Commission had power to award reparation on the basis of that kind of alleged competitive practices.

[10] The district court concluded that the subsidiary issues "must follow the major charge as being within the jurisdiction of the Commission." But it cannot be thought that the district court would casually innovate a doctrine that the Commission had an associative jurisdiction which extended its statutory jurisdiction to all allied or subsidiary complaints. What the district court in fact held was that the charges of unfair competition were so clearly dependent upon the main allegations relating to car interchange, etc., that it would not carve up the complaint to separate these minor and incidental allegations in order to create an independent cause of action; these, therefore, followed the major charges.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN B. PRIZER
HUGH B. COX
JOSEPH F. ESHELMAN
*Attorneys for*
*Pennsylvania Railroad Company*

CHARLES COOK HOWELL
FRANCIS M. SHEA
LAWRENCE J. LATTO
U. B. ELLIS
*Attorneys for*
*Atlantic Coast Line Railroad Company*

SIDNEY S. ALDERMAN
HENRY L. WALKER
WALDRON M. WARD
FRANCIS M. SHEA
WARNER W. GARDNER
*Attorneys for*
*Southern Railway Company*

HUGH B. COX
L. JAMES HUEGEL
*Attorneys for*
*Baltimore and Ohio Railroad Company*

HAROLD J. GALLAGHER
JAMES B. MCDONOUGH, JR.
W. R. C. COCKE
CHAS. T. ABELES
*Attorneys for*
*Seaboard Air Line Railroad Company*

W. T. Pierson
Duane E. Minard
*Attorneys for*
*Erie Railroad Company*

J. Carter Fort
Thomas L. Preston
Waldron M. Ward
Gerald D. Finney
*Attorneys for*
*Association of American*
*Railroads*